In the Supreme Court of the United States.

OCTOBER TERM, 1910.

CHICAGO, INDIANAPOLIS & LOUISVILLE Railway Company, appellant,
v.
THE UNITED STATES.
No. 74.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The vital question in this case, and the only one concerning which any statement is necessary, is whether or not, by prohibiting carriers from demanding or accepting greater or less or *different* compensation from that specified in their published tariffs, section 6 of the act to regulate commerce, as amended in 1906 (34 Stat. 584, 587), has forbidden such companies from bartering transportation for advertising when their tariffs, without exception, express the rates for such transportation in dollars and cents. In other words, the question is whether or not railroad companies may ignore the word "different"

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in section 6 and demand payment from one patron in money while at the same time accepting payment from another patron in advertising, or in coal or iron or wood or oil, or anything else which the railroad company sees fit to accept.

Appellant strenuously insists that the word "different" in section 6 is without significance and that the real issue in the case is whether or not the exchange of transportation for advertising in the manner provided for in the contracts introduced in evidence actually works such a discrimination or preference as is prohibited by sections 2 and 3 of the Interstate Commerce Act, *i. e.*, an *unjust* or *unreasonable* discrimination or preference. The Government, on the other hand, contends that the language of section 6 is clear and explicit and leaves no room for such a construction as that urged by appellant; that it was the purpose of Congress to prevent the question of the *injustice* of the discrimination, with its attendant difficulties and uncertainties, from arising in this connection by requiring carriers to fix the kind as well as the amount of compensation acceptable for its services and to thereafter receive no different compensation either in kind or amount; and that therefore the question whether or not these contracts violate sections 2 and 3 is not essential to the decision of this case.

Such being the Government's contention, an elaborate statement of facts is unnecessary. There is no dispute with respect to the form or execution of the contracts. It is charged by the petition (R., 3, 5)

and admitted by the answer (R., 10) that, prior to the commencement of this suit, appellant had entered into contracts with the Munsey Publishing Company and some two hundred and fifty other publishers of newspapers, magazines, and other periodicals, identical in form except in respect of the amounts of advertising to be done and of transportation to be furnished, each of which contracts provided that the publisher would insert in his publication a stipulated quantity of advertising and that appellant would, "in full consideration" thereof (i. e. in full payment therefor) issue transportation of a stated value based on appellant's published tariff rates "for the personal use of the publisher, his employes or immediate members of his or their families" (R., 3). In other words, the contracts expressly and unqualifiedly provide for the barter of transportation for advertising. The publisher can not demand payment in money or anything else but transportation, and the sole question is whether or not such barter arrangements are lawful, it being expressly stipulated that appellant's tariff rates are without exception shown in dollars and cents. (R., 54.)

ARGUMENT.

The following points will be made:

First. Literally interpreted, section 6 of the act to regulate commerce, as amended, plainly forbids the acceptance of compensation which is different either in kind or amount from that specified in the published tariffs, viz, money; and it therefore prohibits the exchange of transportation for advertising.

Second. It is obvious that, whether or not the contracts in question, or any of them, actually work discriminations or preferences contrary to sections 2 and 3 of the act to regulate commerce, the practice of bartering commodities for transportation, if once permitted, will invite frauds upon the law, and can not fail ultimately to result in all sorts of discriminations and preferences. This fact not only explains the insertion of the word "different" in section 6, but furnishes a conclusive reason why this court should not depart from the literal interpretation of that section.

Third. The necessity of adopting the literal interpretation of section 6 is also shown by a comparison of its language and purposes with the language and purposes of sections 2 and 3.

Fourth. The literal interpretation of section 6 will not cause any of the inconveniences or inconsistencies suggested by appellant.

Fifth. Section 6 undoubtedly requires the kind of compensation to be specified in the published tariffs.

As to these—

FIRST.

Literally interpreted, section 6 of the act to regulate commerce, as amended, plainly forbids the acceptance of compensation which is different either in kind or amount from that specified in the published tariffs, viz, money; and it therefore prohibits the exchange of transportation for advertising.

The full text of section 6, so far as it is pertinent, is as follows:

> *No carrier, unless otherwise provided by this act, shall engage or participate in the transpor-*

> *tation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier* charge or demand or collect or receive a greater or less *or different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time. (24 Stat., 379, c. 104, as amended by 34 Stat., 584, 587, c. 3591.)

That the word "different" in the phrase "greater or less or *different* compensation" means different in kind is shown by numerous considerations:

I.

It is elementary that every word in a statute is to be given its proper significance. Said Mr. Justice Strong, in *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115:

> We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

And the only way in which any significance can be given to the word "different" is by construing it to mean "different in kind." Otherwise, it will mean exactly what the expression "greater or less" means, and thereby become superfluous.

II.

The rule is well settled that—

> When two words or expressions are coupled together, one of which generically includes the other, *it is obvious that the more general term is used in a meaning excluding the specific one.* (Endlich on Interpretation of Statutes, sec. 396.)

Under this rule the word "different" can not mean "greater or less." Hence it must mean "different in kind."

III.

The word "different" was inserted by the amendatory law of 1906. That law was passed *for the express purpose of curing defects in the then existing law.* Section 6 in particular (in which the word appears) was concededly inadequate. For more than ten years the Interstate Commerce Commission had pressed Congress to amend it; calling attention to the fact that uniformity of charges could not be enforced until the section was bettered. The language in question was suggested by the commission as early as 1897, when it submitted to Congress a draft of a bill to amend the existing law. (Eleventh Annual Report of Interstate Commerce Commission,

p. 141.) It was likewise in the draft of the bill recommended by the commission in 1905 and which formed the basis of the Hepburn Act. (See Nineteenth Annual Report of Interstate Commerce Commission, p. 178.) This last bill was prepared at the request of the Senate Committee on Interstate Commerce after an extended inquiry during the course of which the commission was heard. (Id., p. 5.) Further than that, the words "or different" were not in the act of 1906 when it originally passed the House. (See 40 Cong. Rec., pt. 7, p. 6608.) They were put into the bill by a Senate amendment (No. 27, offered by Senator Tillman; id., p. 6617). This amendment among others was considered three times in conference (40 Cong. Rec., 7428, 7434, 7998, 8345, 9258, 9289) *and was itself amended by the conference committee before it finally passed.* (See Rep. of Conference Com., 40 Cong. Rec., p. 9522.) In view of this history it is impossible to conceive that the word "different" was not deliberately and purposely inserted; and, if it was, the object must have been that already stated, viz, to prohibit the acceptance of compensation different in kind and not merely different in amount from that specified in the published tariff.

Further, in showing that the use of the word "different" was deliberate and purposeful, the above-recited history of its introduction into the act disposes of the appellant's contention that the court should here apply the rule that when statutes are *revised* an intent to change their meaning is not to

be presumed, for such history shows conclusively that the act of 1906 was not a mere revision but a corrective measure. Beyond that, however, the stated rule has no application, even in the case of a revision when a word is inserted in a statute which would become superfluous if the rule were applied. (*United States* v. *Bowen*, 100 U. S., 508.)

IV.

Congress has recognized that the word "different" means "different in kind." At the first session of the Sixtieth Congress there was introduced a bill (Senate bill No. 3924) to amend the law so as to permit the exchange of transportation for advertising, but at the request of the Committee on Interstate Commerce, after the bill had been considered by it, the bill was, by unanimous consent, "indefinitely postponed." (42 Cong. Rec., pt. 2, p. 1746.)

V.

The Interstate Commerce Commission has construed the word "different" to mean "different in kind" in a circular (No. 2–A of September 15, 1906) which was issued immediately after the passage of the Hepburn Act, and in which it is stated that—

> Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of persons or property. (Twentieth Annual Report of Interstate Commerce Commission, p. 166.)

This declaration by the commission of the meaning of the act is of convincing weight, because the language of section 6, upon which it is based, was recom-

mended and the amendment by which it was inserted in the act was drawn by the commission itself. This statement was openly made on the floor of the Senate when the amendment was proposed (40 Cong. Rec., pt. 7, pp. 6609–6617), and by reference to the reports of the commission for 1897 and 1905 it will be seen that the amended section 6 is identical in form with that recommended by the commission in those reports. The commission's interpretation of the act has therefore all the weight attaching to an author's construction of his own language and should control, in the absence of anything showing a contrary purpose on the part of Congress.

VI.

The Supreme Court of Nebraska in the case of *State* v. *Union Pacific R. R. Co.*, 126 N.W. Rep., 859 (not yet reported in the Nebraska Reports), ruled that a similar phrase in a state statute much less explicit in its language than is section 6 of the interstate commerce law forbids the acceptance of compensation different in kind. The facts in that case were identical with those here, except that the contract did not fix the rate to be paid for the advertising. This difference, however, is not material, as the testimony was that the current rate was invariably paid. It was held that the contract violated the provisions of the Nebraska law prohibiting common carriers from charging one person a greater or less compensation than another or from charging "*other than* the rates fixed and established."

SECOND.

It is obvious that, whether or not the contracts in question, or any of them, actually work discriminations or preferences contrary to sections 2 and 3 of the act to regulate commerce, the practice of bartering commodities for transportation, if once permitted, will invite frauds upon the law, and can not fail ultimately to result in all sorts of discriminations and preferences. This fact not only explains the insertion of the word "different" in section 6, but furnishes a conclusive reason why this court should not depart from the literal interpretation of that section.

I.

While it is not proposed to argue at length that the contracts in question do in fact work the particular discriminations or preferences prohibited by sections 2 and 3, it is nevertheless proper to set forth, briefly, some of the considerations which support that view, because, even if they do not conclude the question, they certainly show *that there is at least strong reason to suppose* that the contracts will work discriminations and preferences of the most unjust and unreasonable kind, and that therefore Congress must have intended to foreclose the question by requiring strict adherence to the tariff rates, as well in respect to the amount as in respect to the kind of compensation. Such considerations are:

1. The facts that the publisher is willing to take transportation in payment for the advertising and that the railroad company is *un*willing to pay money for it. If the publisher did not think he was getting

a bargain by taking transportation, he would certainly demand payment for the advertising in money, for if he had the money he could buy transportation whenever he needed it, and if he had no occasion to travel would be ahead just so much, while by limiting his compensation to transportation he runs the chance of getting no return whatever for the advertising, because he sometimes has no occasion to use the transportation. (R., 21, 34, 35.) Similarly, if the railroad company thought the advertising was worth to it in money what it pays in transportation, it would be willing to pay for it in money, or at least to give the publisher the option to take either money or transportation. The Nebraska court, in *State* v. *Union Pacific R. R. Co., supra,* put the matter very forcibly as follows:

> The defendant insists that the only advantage that it derives from these contracts is that it thereby sells transportation to persons who otherwise might not purchase it; but, if persons belonging to a certain class are induced to purchase transportation in excess of that which they would buy for cash, it is plain that the inducement must be sufficiently strong to cause them to believe that they are receiving transportation for a less amount than if they paid for it in money, or that they are receiving advertising patronage not otherwise to be had. There evidently must be some advantage accruing to the contracting parties, or each of them must think so, else they would not enter into the contract (p. 862).

2. The undisputed evidence shows that advertising has no fixed market value; that while most publishers have schedules of prices, there is no pretense that the schedules are adhered to. (R., 15, 20, 21, 27, 39, 45.) In some cases it was even shown to be "optional with the [advertising] solicitor to get what he thought best." (R., 28.) In other cases it was shown that "at the last chance" the publisher was willing to take almost anything he could get (R., 43); that he "held up" his friends when he could (id.); that he started his solicitors out with "dummies" (presumably fictitious contracts) to make his patrons think that he was getting more than he was actually receiving for his advertising space (R., 43); and, finally, that if he happened to have unused space he inserted advertisements for his friends free. In other cases it was testified that customers of long standing were allowed better prices than newer ones (R., 16–17, 20); likewise that special rates were made for large orders (R., 25, 26, 39); and, beyond all that, one publisher frankly admitted that a railroad contract was looked upon as "a sort of trade order" and that as a consequence he charged the railroad company more for space than he charged customers who paid in cash. In view of this utter lack of uniformity of charge, how can discriminations fail to result? Does not the publisher get his transportation for less than he would have to pay for it in money when he gets from the railroad company, say, $25 worth of transportation for advertising space which he sells to his cash customers for $20?

3. Even if each publisher adhered to his own schedule price for advertising, it is obvious that there is no fixed relation between the schedule prices of the different publishers. Each fixes such price as he thinks he can get, and therefore, although advertising space may be equally valuable in either of two publications, one may charge for it more than another. In other words, there is no such thing as a *general* market price for advertising, even if there is such a thing as a fixed price for advertising in some particular publication. As a result, it is quite impossible to make contracts such as these without actually charging one publisher more than another for like transportation. Hence discriminations must necessarily result as between the publishers themselves.

4. No one can question that the privilege of paying for something "in trade" is considered advantageous. However difficult it may be to show the advantage in some particular case, general experience has nevertheless proven it. Indeed, the evidence shows that in one case it was deemed sufficient to warrant a material reduction in the price charged for the advertising (R., 17). Does not the railroad company then give a preference to the publisher from whom it accepts advertising in payment for transportation over the publisher from whom it demands cash, and does it not prefer all publishers from whom it accepts advertising over other patrons who have other commodities which they would be willing to barter and which the railroad company could use? True, it

will be argued, that the railroad company has the right to choose its own advertising media; and that is doubtless so. But, on the other hand, it must treat all who desire *transportation* over its road exactly alike, and no matter how great its freedom of contract concerning matters *not* involving transportation service may be, the moment transportation service enters into a contract the regulations in respect to discriminations and preferences become applicable and the railroad company has no right to give an advantage in respect to transportation merely because it thereby gets, or thinks it gets, an advantage in some other transaction. Discriminations and preferences can be justified only by conditions *affecting the transportation*. This is well settled.

(*a*) The Interstate Commerce Commission has so decided in *In re Persons Free or at Reduced Rates*, 5 I. C. C. Rep., 69, 81–82, where it was said:

> Without further citation of authority, the construction we give to section 2 of the act to regulate commerce is that where the service by the carrier subject to the act is "like and contemporaneous" for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22; and that where the traffic is "under substantially similar circumstances and conditions" in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such

> passengers hold unlike or, as sometimes termed, unequal official, social or business positions, or belong to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier.

And this interpretation of the law has been followed by the lower Federal courts.

> *Ex parte Koehler*, 31 Fed., 315, 321–322.
> *In re Charge to Grand Jury*, 66 Fed., 146–148.

(*b*) Such is the construction placed by the English courts upon the English Traffic Act, which served as the model for the discrimination and preference clauses of the act to regulate commerce. (*Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 263, 282.)

In *Denaby Main Colliery Co.* v. *Manchester Ry. Co.*, 11 App. Cas., 97, 120, Lord Chief Justice Blackburn said:

> I think that it is finally settled * * * that if passing over the same portion of the railway, the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances," and *that the circumstances are those relating to the carriage of goods, not to the person of the sender.*

(*c*) This court has unmistakably so held.

In *Wight* v. *United States*, 167 U. S., 512, it was held that the fact that a shipper had a track connection with a rival road so that it was necessary to pay cartage in order to secure his business was not a fact to be taken into consideration in deter-

mining whether or not the allowance of this cartage was an unjust discrimination against other patrons to whom cartage was not paid, the court saying (p. 518):

> * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, *under the same circumstances of* carriage, are compelled to pay different prices therefor.

In *Armour Packing Co.* v. *United States*, 209 U. S., 56, it was held that a contract to carry freight at a stipulated rate, which was the published rate at the time the contract was made, could not legally be carried out when the published rate had been raised. The court said (p. 80):

> It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

> In the Elkins Act Congress had made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat., 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change is the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. *If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.*

And here it should be noted that neither this nor any other court has ever upheld a preference given to some particular patron and not open to all who are similarly situated. The authorities cited by appellant deal only with cases in which the carriers have offered like inducements to all who chose to avail themselves of the offer. Thus in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 263, in which the right of railroads to make "party rates" was upheld, the party rates were open to all who chose to avail themselves of them. So, too, in *Interstate Commerce Commission* v. *Ala. Mid. Ry. Co.*, 168 U. S., 144, although the right of the railway company to charge more for a shorter than for a longer haul was sustained, because of competi-

tive conditions of the longer haul, yet every shipper desiring to ship for the greater distance was obliged to pay the same rate on similar freight. The same observation applies to the case of *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S., 648, in which it was again held that competition should be taken into consideration in determining whether or not discrimination against *localities* were unreasonable. The case of *Northern Pacific Ry.* v. *Adams*, 192 U. S., 440, is not at all in point. It was not contended in that case that the issuance of the pass to Adams's intestate was in violation of the interstate commerce law. The contrary was assumed, and the language quoted in appellant's brief had no reference to the right to contract for *free transportation*, but related to the right of an individual to give a *release of liability* in advance of any injury—voluntarily and for *any* good consideration.

II.

If railroad companies may accept *advertising* in payment for transportation, then the right of the railroad to barter transportation for *any sort of commodity* or *any kind of consideration* is at once established. What abuses it would lead to no one can tell. Railroads are large purchasers of coal, iron, steel, oil, lumber, wearing apparel, foodstuffs, and a thousand other commodities. Most of these commodities, like advertising, have no general market value. The price paid for them is determined by negotiations in each case. If a railroad company accepts payment from one patron in advertising, from another in coal, from another in iron, from another in lumber,

from another in oil, and from a hundred others in a hundred different commodities, how can it ever be determined with anything like reasonable certainty whether or not each of these numerous patrons is paying exactly the same rate for his transportation? What better opportunity for giving secret rebates could be asked? Of what earthly use would be the requirement of section 6 that rates be published? As was said by the Supreme Court of Nebraska in the *Union Pacific case, supra:*

> If a railway company can adopt the principle of barter and receive in return for its service specific articles, the value of which may vary from day to day, and often may be uncertain, the magnitude of the task of ascertainment of the value of each article alone would render the regulation of rates, so as to prevent discrimination, absolutely impossible. To procure uniformity there must be a standard measurement. (126 N. W. Rep., 862.)

III.

These considerations make obvious the motive which impelled Congress, by the insertion of the word "different" in section 6, to require that the compensation demanded of or accepted from each patron of a road be the same in kind as well as in amount; and they make clear, too, the necessity of a literal interpretation of the statute by the courts. Indeed, this court has itself declared such necessity in the case of *Union Pacific* v. *Goodridge*, 149 U. S., 680, 690, in which the railroad company claimed

that a state statute prohibiting discriminations and preferences was not violated by the allowance of a fixed rebate in settlement of an unliquidated claim for damages. In repudiating such contention this court said:

> While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a *liquidated* indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature, to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality. * * * To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove.

Equally pertinent language was used by Judge Wellborn, of the District Court for the Southern District of California, in a similar case arising under the Interstate Commerce Act. He said:

> These statutes, as said by the Supreme Court, should be reasonably construed so as to promote their objects, and it is manifest that a construction which allows any deviation whatever from said standard would seriously impair the efficiency of said statutes, if not render them nugatory, and is therefore wholly inadmissible. *A rate, to be uniform in its operation, must necessarily be expressed in dollars or cents, and when so expressed, as is the case with the rate here involved, the mode of payment is an essential part of the rate.* To so interpret the law as to allow the carrier to disregard said mode, and to accept a part only of its compensation in money and the balance in a commodity, or by way of compromising a claim, would invite and open wide a door to the very discriminations which the statutes were designed to suppress. In order to exclude such an interpretation of the law, section 1 of the Elkins Act (act Feb. 19, 1903, c. 708, 32 Stat., 847; U. S. Comp. St., Supp., 1907, p. 880) forbids in terms any concession by a carrier in respect of the transportation of property whereby such property "by any device whatever" is transported at a less rate than named in the legal tariff, and expressly declares that any departure from the legal tariff, or any offer to depart therefrom, "shall be deemed to be an offense under this section of this act," so that the construction of said

act which I have just declared is clearly required by the letter as well as the spirit of the law.

I hold that the acceptance by the defendant of a less sum of money than that named in its tariff for the transportation of the property described in the indictment, if there has been such acceptance, was a departure from the legal rate, and that it is no justification for such a departure, nor is it any defense to a prosecution therefor, that the acts of the carrier were done in compromise of claims for loss of property in transit. (*United States* v. *A., T. & S. F. Ry. Co.*, 163 Fed. Rep., 111, 113.)

The undoubted purpose of section 6 was to compel carriers to fix rates which would be uniform in their operation (*N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391; *T. & P. Ry. Co.* v. *Abilene Cotton Oil Company*, 204 U. S., 426, 439), and since the statute in that respect is remedial, it is "entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve." (*N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission, supra.*)

THIRD.

The necessity of adopting the literal interpretation of section 6 is also shown by a comparison of its language and purposes with the language and purposes of sections 2 and 3.

While each of the three stated sections has the same general object, viz, the securing of uniformity of rates, the ways in which they seek to accomplish

that object are wholly different. Section 6 does it by first requiring that no service shall be performed at all unless there is a published rate covering it, and by then requiring that the published rate, whatever it may be, shall be strictly adhered to. Section 2 does it by requiring that no carrier shall—

> charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions (24 Stat., 379).

Section 3 does it by declaring that no carrier shall—

> make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, [nor] subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (24 Stat. 379).

In other words, while sections 2 and 3 are broad enough in their terms to prohibit discriminations or preferences resulting from departures from the published rates, their fundamental purpose is to require that the rates *as established and published*

by the carriers should be fair and just in relation to each other. Thus, if a railroad company undertook to establish by published tariffs two rates between given points, one for white passengers and the other for black passengers, though the accommodations in each case were identical, the attempt would be frustrated by section 2, because that section allows but a single charge to be made for like service under *similar conditions*. But while section 2 recognizes that different charges may be proper when the circumstances are dissimilar, section 3 recognizes and requires that such difference shall not be *undue* or *unreasonable*. Thus, while section 2 does not forbid a rate between Chicago and New York different from that between Chicago and Philadelphia, section 3 requires that the difference be not unreasonable.

Section 6, however, has no relation to rate *making*. It operates only after the rates have been made, and its great purpose is to require such *publicity* of rates that each patron of the carrier may know exactly what he and all other patrons must pay for given service. The difference is well illustrated by the so-called "party rates." It was held in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 263, that section 2 is not violated by the establishment of one rate for single passengers and a lower rate for parties of ten or more traveling together between the same points; and of course the publication of such rates would not violate section 3 so long as the difference between the single and the party rates was not unreasonable. But if a carrier, though it had established and published

only one rate for the transportation of passengers between given points, should attempt to give a reduced rate to a party of ten or more persons traveling together section 6 would be clearly violated, although the giving of such reduced rate could be made entirely lawful by publishing a proper tariff to cover it. Section 6 is therefore clearly a complement of sections 2 and 3 and would be absolutely nullified by sustaining appellant's contention that it has no operation unless the departure from the published rate either is unwarranted by dissimilarity of conditions or is greater than such dissimilarity can properly allow. This is made very plain by setting out the section as it would read if appellant's construction of it were sound, viz, "No carrier shall charge, demand, collect, or receive *unreasonably* and *unduly* greater or less or different compensation than that specified in the tariff filed and in effect at the time."

If the section read this way, what useful purpose could be served by publishing the tariffs at all? No patron could tell what other patrons were paying because he would have no means of knowing what circumstances were deemed by the carrier sufficient to warrant a secret departure from the tariff rates.

But extended argument is unnecessary. This court has twice declared that the reasonableness or unreasonableness of the departure from the tariff rate can not be the test of the violation of section 6. In *Armour Packing Co.* v. *United States*, 209 U. S., 56, it was claimed that a contract to carry freight at a specified rate which was legal when the contract was

made could be lawfully executed notwithstanding a subsequent change in the published rate, but this court held otherwise, saying:

> It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published, and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and *but one rate to be charged for similar carriage of freight*, and that *the filed and published rate, equally known by and available to every shipper.*
>
> In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat., 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. *If the rates are subject to secret alteration by special agreement then the statute will fail of its pur-*

pose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishment of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force *the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.*

In *American Express Co.* v. *United States,* 212 U. S., 522, it was claimed that section 6 should not be construed as prohibiting the issuance of express franks to the employees of the express company and of other carriers, because "it was not the purpose of Congress to regulate in these provisions gratuitous transportation, but the purpose was to prevent discrimination, rebating, and so forth, where property has been carried by a common carrier for hire." The court overruled this contention, however, saying (p. 532):

* * * But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, in the absence of express exceptions, *we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner*

whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge.

FOURTH.

The literal interpretation of section 6 will not cause any of the inconveniencies or inconsistencies suggested by appellant.

I.

It is said that if the word "different" means different in kind a railroad company can not accept checks or drafts in payment of its charges, and that this would work great inconvenience. If by this it is meant that the railroads are prohibited from expressly agreeing that a check or draft will be accepted as payment *whether it is good or bad*, it is doubtless correct. But in the absence of such an express agreement the delivery and acceptance of a check or draft *does not constitute payment*. That only occurs *when the money called for is received* upon the check or draft. (Benjamin on Sales, 4th Am. Ed., secs. 729–730.) Hence section 6 does not forbid the acceptance of a check or draft in the usual way as conditional payment, which only becomes actual upon receipt of the money.

II.

It is further claimed that the stated construction of section 6 will prevent the carrier from extending credit, as a matter of convenience to itself, to solvent patrons. This claim confuses the prohibition of section 6, against the acceptance of a different *kind* of

compensation, with the discrimination, preference, and rebate provisions. It may well be that a refusal to extend credit to one solvent patron while giving it to another would constitute an unjust discrimination or preference; and it is perfectly obvious that the credit system might be used as a device for rebating (using the term in the broad sense of any practice which enables a shipper to get an undue pecuniary advantage over his competitor), for if a shipper were allowed to withhold payment of large sums of money for long periods of time and take the interest on it meanwhile it would be tantamount to giving him a rebate. But whether or not the payment is immediate, the requirement as to the *kind* of compensation is complied with when the exact amount due the railroad company is paid in money. The carrier then charges, demands, collects, and receives compensation of the *kind* specified in its tariff. If through the credit system it commits abuses, the remedy is to be found in sections 2 and 3 and in the Elkins Act.

III.

Again, it is urged that claims for damages to goods in transit may be set off against the carrier's bill for charges, and that this is inconsistent with the literal construction of section 6. To this there are several answers:

1. It has never been held by this court that such set-offs may be made *without violating the interstate commerce law*. Almost the exact reverse was held by this court in *Texas & Pacific Ry. Co.* v. *Abilene*

Cotton Oil Co., 204 U. S., 426, in which it was decided that a suit could not be maintained to recover alleged excessive charges paid under protest when the rate charged was the established tariff rate and it had not been declared unreasonable by the Interstate Commerce Commission. There has never been any doubt of the common-law right of action to recover *excessive* charges (although, as the court pointed out in the case under consideration, the right to recover charges on the ground that they were discriminatory, though not unreasonable in and of themselves, was doubtful); and yet it was held that the passage of the act to regulate commerce destroyed that right. The same thing may well be held in respect of the right to set off damage claims against transportation charges.

2. Before a damage claim can be set off against transportation charges it must become liquidated through the verdict of a jury or finding of a court. When the set-off occurs, therefore, each party has an adjudicated and liquidated demand against the other. The striking of a balance and manual delivery by the debtor of only that balance does not prevent the compensation received by the railway company from being exactly what it would have been had the money actually passed; and it is as truly a money payment to allow the *retention of a specific sum of money* as it is to pay that sum over. And therein is the difference between the set-off and the barter. In the latter case, whether the things bartered be stated to be worth so

much money or not, there is no escape from the fact that when the transaction occurs neither party has anything belonging to the other; and when one commodity is traded for another, in no matter what terms the transaction is expressed, it remains a trade of commodities and not a trade of money for a commodity. Hence, there is no necessary inconsistency between allowing set-offs of liquidated debts and prohibiting exchanges of commodities.

IV.

Finally, it is claimed that the publisher "could hand over $500 in money for tickets or mileage books, and in turn this could be handed back for advertising" without violating the law, and that it is absurd to forbid the parties from doing directly what they could undoubtedly do indirectly. The obvious answer to this contention is, however, that if the publisher handed over the money *only on condition that it would be handed back in payment for advertising* the transaction would still be a mere barter of transportation for advertising, however cleverly its real nature might be concealed. The only way in which a violation of the statute could be avoided would be by *bona fide* purchase of transportation or advertising without contemporaneous agreement on the part of the seller to purchase on his part a like amount of advertising or transportation. And the fact that such a transaction has never occurred is the best possible evidence that the interested parties would never resort to it.

As the matter now stands the carrier's refusal to pay for the advertising in money is the highest evidence that if the indirect method were honestly resorted to the publisher would never get the advertising from the carrier. The latter would keep the money and take a chance of getting along without the advertising.

FIFTH.

Section 6 undoubtedly requires the kind of compensation to be specified in the published tariffs.

A somewhat extended argument is submitted by appellant on the point that section 6, although it forbids the acceptance of "greater or less or different" compensation from that "*specified* in the tariff filed and in effect at the time," does not require the tariff to state the kind of compensation which will be accepted.

It would be a sufficient answer to this claim to point out that by forbidding the acceptance of compensation "different" from that "*specified*" the act does *in terms* require that the kind of compensation be specified in the tariff.

But there is another equally conclusive answer. Section 6 admittedly requires the rate to be stated. That can not be done without specifying *some* sort of compensation. The rate must be so many dollars, or so many cents, or so much wheat, or corn, or oats, or something else. And whether it be expressed in one or another thing, its expression is a specification of what will be accepted in payment of it.

CONCLUSION.

It is submitted, therefore, that, since the rates in question were without exception expressed in dollars and cents, section 6 forbade the acceptance of anything but dollars and cents, *i. e.*, money, in payment of them, and that consequently the contracts in question were illegal; and the decree of the Circuit Court should be affirmed.

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DECEMBER, 1910.

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